UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CONNIE WEEKS,	)	
Administratrix of the Estate	)	
of Perry Weeks, Deceased,	)	**Civil Action No. 7:02cv00724**
	)	
Plaintiff,	)	
	)	**Memorandum Opinion**
v.	)	
	)	
WESTERN AUTO SUPPLY CO., et al.,	)	**By: Samuel G. Wilson**
	)	**Chief United States District Judge**
Defendants.	)	

Plaintiff Connie Weeks, Administratrix of the Estate of Perry Weeks, III, brings this action for damages pursuant to the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1145, and the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-1191, against Advance Stores Company, Inc. ("Advance" or "the Company"), the Corview Comprehensive Medical Expense Benefit Plan ("the health plan"), the Prudential Employee Group Life Insurance Plan ("the life plan"), Western Auto Supply Company, and the Prudential Long Term Disability Plan. In April, and again in May, 2000, Advance mailed Perry notice of his conversion rights under COBRA. By that time, however, Perry had become acutely ill, was hospitalized and apparently did not read his mail. Mrs. Weeks, who also apparently did not review Perry's mail, called the Human Resources Manager at Advance's distribution center who allegedly incorrectly informed her that her son's insurance benefits terminated at the end of his employment with Advance. Based on that information, Perry failed to elect continued health and life insurance coverage before dying from acute leukemia. This matter is before the court on defendants' motion for summary judgment. The court finds that Advance properly notified Perry in writing of his continuation rights under COBRA and that the allegedly mistaken information

Mrs. Weeks received over the phone cannot act to extend coverage.

I.

Perry worked for Advance from October 17, 1999 until he resigned on March 23, 2000. (Def.'s Exh. 1 to Finley Aff.). He began work at an Advance distribution center and later transferred to the road crew. (Weeks Dep. at 14). On Perry's first day, the Human Resources Manager for the distribution center, Karen Yates, provided Perry with an employee handbook and placed her card in the front cover, in case Perry had any questions. (Yates Dep. at 9, 12; Weeks Dep. at 4). Perry signed an acknowledgment that he received the handbook. (Def.'s Exh 4 to Finley Aff.). The handbook briefly summarizes the benefits available to employees of Advance including health and life coverages and states that "complete copies of all plan documents are available from the benefits department" and that "employees have the right to request these documents for review at any time." (Def.'s Exh. 3 to Finley Aff. at 26). It specifically notes that the optional life and accidental death insurance is portable should Perry leave Advance. (Id. at 27). According to the handbook "[t]o 'port' the coverage, an employee must contact the insurance company directly within 30 days of separating from employment with Advance." (Id.).

Three months later, Perry became eligible to receive Advance group insurance benefits. Yates answered Perry's questions about benefits, (Weeks Dep. at 14), and on December 23, 1999, Perry enrolled in the health and life plans. (Pl.'s Exh. 1). Perry selected $100,000 in optional term life insurance coverage underwritten by The Prudential Insurance Company of America. Perry received a description of the terms of the health plan, in addition to the brief description contained in the employee handbook. (Weeks Aff. ¶ 18). The health plan description fully explains Perry's COBRA continuation rights and Advance's responsibility to send him notice

after his employment ends. (Def.'s Exh. 1 to Robbins Aff. at 55). According to the plan, upon the happening of a qualifying event, Advance, the plan administrator and sponsor, provides "[c]omplete instructions on how to elect . . . within 14 days of receiving notice of the qualifying event." (Id. at 57). Eligible participants have 60 days "from the later of the date coverage terminates or the date notice of the right to continue is sent." If the covered person fails to elect within that time, the right to elect ceases. (Id.).

Perry resigned from his position on March 23, 2000. On March 29, Perry felt sick and went to a doctor who diagnosed him with an acute leukemia relapse. (Weeks Dep. at 6). The next day, March 30, Perry, his mother and his father traveled to St. Jude's Children's Research Hospital in Memphis, Tennessee where Perry and his parents remained until his death on June 9, 2000. (Id. at 7-8). Perry was never well enough to leave the hospital during that time. His parents stayed at his bedside and did not return to their home in Vinton, VA until June 9.

While in the hospital, Perry planned to have a bone marrow transplant and anticipated a long stay at St. Jude's Hospital. (Id. at 17, 19-20). He asked his mother to contact Advance to determine what benefits he could still claim. (Id. at 17). In early April, from Perry's hospital room, Mrs. Weeks called her niece, whose husband works for Advance, and asked her for the number of an Advance employee able to advise her about Perry's benefits. (Id. at 13). Mrs. Weeks' niece gave her Yates' telephone number, and Mrs. Weeks immediately telephoned Yates and asked about Perry's benefits. (Id. at 15). According to Mrs. Weeks, Yates told her that Perry's benefits ended on the last day of his employment. (Id. 15-16). Yates provided no explanation nor gave Mrs. Weeks additional phone numbers in order for her to investigate the matter further. Id. Mrs. Weeks believed Yates and took no further action. (Id. at 38). St. Jude's

Hospital, nevertheless, provided charitable services to the Weeks to assist them with Perry's medical bills, and Perry received some health insurance coverage as a dependent under his father's Trigon Health Insurance Plan. (Weeks Dep. at 49-50).

According to the terms of Perry's health plan, Perry's health insurance terminated on the last day of Perry's last month of employment, that is, March 31, 2000. (Def.'s Exh. 1 to Robbins Aff. at 3). As mandated by COBRA, Perry was entitled, under the plan, to elect, within sixty days from March 31 or from the date Advance sent Perry notice, whichever was later, to continue his health insurance coverage at his own expense. 29 U.S.C. § 1161(a)(1); (Def.'s Exh. 1 to Robbins Aff. at 55-57). Perry's life plan also terminated on the last day of his employment. The plan permitted him to elect to convert his group life insurance coverage with The Prudential Insurance Company of America to an individual life insurance contract if he applied with Prudential and paid his first premium within 31 days. (Def.'s Exh. 2 to Robbins Aff. at 15-16, 31-32). Evidence of insurability would not have been required and his premium rate would have been determined by his "class of risk and age at the time." (Id.). According to Advance, ERISA does not require continuation rights for life insurance plans nor require that Advance notify its employees of this option, although, as a courtesy, Advance mails notice to them. (Robbins Dep. at 44).

While the Weeks were away from home, Mrs. Weeks instructed her daughter to pay the family's monthly bills but did not leave instructions for other correspondence the family might receive. (Weeks Dep. at 9-10). After returning home, Mrs. Weeks, devastated by her son's death, did not review any of the mail, (id.); however, Advance asserts that while the Weeks were away, it sent Perry notice of his rights to continue his health and life insurance.

According to Advance, each week specialists in the Company's benefits department

generate lists of employees eligible to continue their health and life insurance coverage, respectively. (McCadden Aff. ¶5; Mack-Carter Aff. ¶4). In the case of health insureds who have continuation rights, Advance benefits specialists send the employees' data to a third-party claims administrator, American Benefits Management ("ABM"), who then mails COBRA notices to those employees listed in Advance's report.[1] (Robbins Dep. at 24; McCadden Aff. ¶6). For the employees with life insurance, the Advance benefits department generates a letter containing the information the employee needs to make his or her election and sends the notice directly. (Mack-Carter Aff. ¶5; Robbins Dep. at 44, 47). Through this process, Advance routinely mails these employees notice of their rights to continue their coverage. Perry's name appears on both the health insurance and life insurance lists of eligible employees. (Def.'s Exh. 1 McCadden Aff.; Def's Exh. 1 to Mack-Carter Aff.).

ABM photocopied for its records the envelope in which it mailed Perry notice of his health insurance continuation rights. (Exh. 3 to McCadden Aff.). The envelope, postmarked April 7, 2000, was addressed to Perry's permanent home address, the only address on file at Advance. (Id.; Weeks Dep. at 7).

In September 2000, Mrs. Weeks received mail from Advance and discovered from reviewing its contents that Perry would have been eligible for additional insurance benefits. (Weeks Dep. at 20; Weeks Aff. ¶15). Prompted by that information, Mrs. Weeks immediately called a phone number referenced in the mailing and spoke with Richard Robbins. (Weeks Dep. at 21). She also began cleaning out Perry's room and discovered that Perry had indeed received

[1]From July 1999 through April 2000, Advance contracted with ABM "to manage most aspects of its health and welfare benefits program." (McCadden Aff. ¶4). United Medical Resources assumed these duties beginning May 1, 2000. (Robbins Dep. at 25).

the Advance employee handbook, the Advance employee benefit summary, and a summary description of the health plan. She did not find information specifically relating to the life plan. (Weeks Aff. ¶18). She also found a letter, dated May 24, 2000, notifying Perry of his right to continue his health benefits. (Id.; Pl.'s Exh. 3). Mrs. Weeks found the letter along with other mail in a shoebox. (Weeks Dep. at 39). She does not know who collected the mail items or stored them in the shoebox. (Id.). After discovering these items, Mrs. Weeks had many conversations with Robbins who told her each time that he had to investigate the matter further. (Weeks Dep. at 22). Eventually, Mrs. Weeks wrote a letter on November 27, 2000, as Robbins had advised her to do, and she spoke to Debra Caldwell, one of the Advance Vice Presidents. (Id. at 23-24). Mrs. Weeks eventually filed this suit.

II.

A.

The health plan, as both parties agree, is subject to ERISA and COBRA which together impose notification duties on employers and plan administrators of employee benefit plans. ERISA requires the plan administrator or sponsor of an employee benefit plan to provide a summary plan description at the time the employee (plan participant) enrolls in the health plan. 29 U.S.C. § 1024. At the end of the employment relationship, COBRA requires the employer to notify the plan administrator. § 1166(a)(2). The plan administrator must then notify the employee of his right to continue his health benefits. § 1166(a)(1). The estate claims that Advance, the sponsor and plan administrator, breached its duty under COBRA to send Perry notice of his rights to continue his health plan. § 1166(a)(1). The court finds that the evidence, in the light most favorable to the estate, shows otherwise.

Briefly, that evidence is as follows. Perry received a summary description of the health plan at some time during his employment. (Weeks Aff. ¶18). In compliance with ERISA, that summary plan description explained Perry's rights to elect and Advance's obligation to provide notice. (Def.'s Exh. 1 to Robbins Aff. at 55-57). In carrying out this responsibility, Advance had an ordinary and routine business practice of identifying eligible employees and sending them complete instructions on how to elect. (Id.). In accordance with its regular practice, Advance prepared a weekly list of former employees eligible to continue their health insurance benefits and forwarded the list to its third-party claims administrator, ABM. (Def.'s Exh. 1 to McCadden Aff.). ABM sent the notices to the employees named on the list. (McCadden Aff. ¶ 6; Robbins Dep. at 25). Perry's name appeared on that list, indicating that ABM sent Perry notice. In accordance with its customary practice, ABM photocopied for its records the envelope it used to send Perry's notice. That envelope is postmarked April 7, 2000. (Id.). The court presumes that the letter arrived three days after the postmarked date.[2] Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 148 n.1 (1984). It follows that the Company sent Perry the statutorily required notice and that Perry received it.[3] Benner v. Nationwide Mut. Ins. Co., 93 F.3d 1228, 1234 (4th

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[2]Richard Robbins testified about Advance's and ABM's mailing practices during his deposition. (Robbins Dep. at 24-25). Because Advance might have cured this objection if presented during the deposition, or in any event, simply inquired further, the objection is waived. Fed. R. Civ. P. 32(d)(3). See Bahamas Agric. Indus., Ltd. v. Riley Stoker Corp., 526 F.2d 1174, 1181 (6th Cir. 1975).

Even if the estate's objections were timely, Advance's records, although created and maintained by a third party, are admissible under the business records exception to the hearsay rule. Fed. R. Evid. 803(6); United States v. Sokolow, 91 F.3d 396, 403 (3d Cir. 1996). Accord United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990).

[3]Even without the April 7, 2000 notification, Mrs. Weeks admits that she found among Perry's belongings another letter, dated May 24, 2000, notifying him of his right to continue his

Cir. 1996); Fed. R. Evid. 803(6), 803(7). From these facts, the court finds that Advance complied with its notification duties under ERISA and COBRA.

B.

The estate similarly complains that the Company failed to send Perry notice of his right to continue his life coverage once he resigned from Advance. The estate points out that although Mrs. Weeks found a summary of the health plan and notice of Perry's health insurance continuation rights among Perry's belongings, she found neither a summary of the life insurance plan nor a post-termination letter explaining Perry's life insurance conversion rights. (Weeks Aff. ¶ 18). The court finds that the evidence before the court on the question of what post-termination notice Advance gave Perry about his group life conversion rights is somewhat equivocal. However, the court concludes that although § 1024 required Advance to provide Perry a summary plan description at the time he enrolled in the life plan, COBRA's post-termination notification provisions do not apply to an ERISA life insurance plan. Accordingly, the court rejects the claim on that ground.

Sections 1161-67 govern an employee's rights to continue and/or convert coverage under an ERISA plan. As various cases have underscored, the plain language of these provisions makes clear that the post-termination notice requirements apply to a "group health plan," defined as a "plan providing medical care," and not to a life insurance plan. § 1167(1); Howard v. Gleason Corp., 901 F.2d 1154, 1161 (2nd Cir. 1990); O'Brien v. Rivkin, Radler & Kremer, No. 95 C 5923, 1996 U.S. Dist. Lexis 1047, (N.D. Ill. February 2, 1996); see also, King v. Consolidation Coal Co., No. 1:00CV00004, 2001 WL 420369 (W.D. Va. January 25, 2001) (stating, generally,

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health benefits. (Weeks Aff. ¶18; Pl.'s Exh. 3).

that "COBRA only requires notice regarding an employee's 'group health plan.'"). The Fourth Circuit briefly addressed the issue in Canada Life Assurance Co. v. Estate of Lebowitz, 185 F.3d 231, 235 n.2 (4th Cir. 1999), simply stating, "[a]lthough this Court has held that an ERISA policy must offer the right of conversion, we have not addressed whether ERISA requires written notice of such a right." Id. (citing White v. Provident Life & Accident Insur. Co., 114 F.3d 26, 28 (4th Cir. 1997)). Before Canada Life, however, the Fourth Circuit rejected the argument that COBRA required coverage continuation rights for disability policies, reasoning that "the continuation requirement of COBRA is designed to focus on the provision of health care coverage." Austell v. Raymond James & Assocs., 120 F.3d 32, 33 (4th Cir. 1997).

This court agrees that COBRA's focus is health care coverage, more particularly the need for effective notification of health care coverage continuation rights. Both ERISA and COBRA appear silent on the subject of post-termination notification concerning life plans. Under the circumstances, the court follows the reasoning of Howard, 901 F.2d at 1161, and O'Brien, 1996 U.S. Dist. Lexis 1047, which reject a COBRA imposed notification requirement of life plan conversion rights because it is not within the plain language of that statute. It follows that Advance was not required to send Perry post-termination notice of his right to convert his life insurance coverage.[4] Both the life plan description and the corresponding summary in the employee handbook make clear that the responsibility to act rests squarely with the plan participant.[5] (Def.'s Exh. 2 to Robbins Aff. at 15-16; 31-32). Consequently, in order to convert

[4]See also Faircloth v. Lundy Packing Co., 91 F.3d 648, 657 (4th Cir. 1996) (expressly rejecting any expansion of an employer's informational duties).

[5]"[E]mployees can rely on the handbook" summaries of the plan documents in addition to the provisions in the plan documents themselves, as long as the descriptions in the handbook are

the group coverage to an individual policy, the covered person, in the plan's words, "must apply for the individual contract and pay the first premium within 31 days after [he] cease[s] to be insured . . . ."[6] (Id.). Similarly, the handbook states "[t]o 'port' the coverage, an employee must contact the insurance company directly within 30 days of separating from employment with Advance." (Def.'s Exh. 3 to Finley Aff. at 27). Therefore, because Perry failed to act within the time period allowed, the estate cannot recover under the life plan.

III.

Regardless of whether Mrs. Weeks received notice, the estate claims Advance breached a duty to correctly advise Mrs. Weeks of the terms of each plan. According to Mrs. Weeks, Yates mistakenly apprised her that Perry's benefits terminated at the end of his employment. (Weeks Dep. at 15-16). As a result, Mrs. Weeks failed to continue Perry's health and life insurance coverage.[7] Because Yates does not qualify as a fiduciary and the plans explain Perry's continuation and conversion rights, the court concludes that Mrs. Weeks could not rely upon Yates' oral representation and the estate may not recover on this claim.

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consistent with the provisions in the formal plan. Glocker v. W.R. Grace & Co., 974 F.2d 540, 542-43 (4th Cir. 1992).

[6]Of course, if plan documents, in addition to those submitted by Advance, required the Company to provide Perry written notice at the end of his employment, the court would be required to enforce that promise. See Canada Life Assurance Co. v. Estate of Lebowitz, 185 F.3d 231, 233-234 (4th Cir. 1999).

[7]Mrs. Weeks attempts to apply common law estoppel principles against Advance based on Yates' oral misrepresentation. Perry was entitled to elect continuation coverage, but neither he nor Mrs. Weeks made such an election or paid the necessary premiums under the written terms of the plan. ERISA, not estoppel, governs the plan. The Fourth Circuit has expressly prohibited a court-ordered extension of coverage through estoppel principles because it would constitute an "outright modification" of the written terms of the plan. Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 59 (4th Cir. 1992).

In response to a plan participant's written request for information, Advance had a duty to provide copies of each plan. §§ 1022, 1024(b)(4). Mrs. Weeks made no such written request, and none of the statute's disclosure requirements suggests that an employer provide oral advice interpreting the plan. The Fourth Circuit has expressly rejected any expansion of an employer's informational duties. Faircloth v. Lundy Packing Co., 91 F.3d 648, 657 (4th Cir. 1996). As such, Advance had no obligation to advise Perry and Mrs. Weeks of their rights under the plan. Id. Nevertheless, if Yates qualified as a plan fiduciary under § 1002(21)(A) and was acting in her fiduciary capacity while giving Mrs. Weeks advice, once Yates attempted to advise Mrs. Weeks, she had a duty to give accurate and complete advice. § 1104(a)(1)(A); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001); Faircloth, 91 F.3d at 657. Only if Yates qualified as a fiduciary, would Mrs. Weeks be permitted to rely on Yates' interpretation of the plan.

"[O]nly persons who perform one or more" of the following functions qualify as plan fiduciaries:

> i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
> ii) he renders investment advice for a fee or other compensation, direct or indirect, with authority or responsibility to do so, or
> iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A); Varity Corp. v. Howe, 516 U.S. 489, 498 (1996); HealthSouth Rehabilitation Hosp. v. Amer. Nat'l Red Cross, 101 F.3d 1005, 1009 (4th Cir. 1996). Once a person qualifies as a fiduciary, that "party is a fiduciary only as to the activities which bring the person within the definition." Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir.

1992). Thus, although a person may perform some fiduciary activities, when acting outside the scope of § 1002(21)(A), he or she does not have fiduciary obligations under ERISA. Id.

In her deposition, Yates states, "I administer benefit packages as directed by Advance," (Yates Dep. at 9), but there is no evidence that Yates exercised discretionary authority or responsibility in her position as a human resources manager at Advance. To the contrary, the evidence shows only that she performed purely ministerial, administrative duties. Mrs. Weeks admits that Yates simply gave Perry a copy of the employee handbook and answered his questions about benefits. She also answered Mrs. Weeks question about benefits, allegedly incorrectly. The handbook indeed directs benefits questions to the human resources department, but answering questions by "reading a computer screen to determine who is and who is not covered" or by reading the plan documents does not amount to "discretionary control respecting management of the Plan . . . ." HealthSouth, 101 F.3d at 1009. Accordingly, administrative acts, such as advising participants about plan benefits based on the terms of the plan, do not amount to discretionary functions under ERISA. Id.; 29 C.F.R. § 2509.75-9 (D-2). Even promises from management cannot support an ERISA breach-of-fiduciary-duty claim. Elmore v. Cone Mills Corp., 23 F.3d 855 (4th Cir. 1994); but see Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 547-51 (6th Cir. 1999).

Thus, the court finds Yates was not a fiduciary and that she breached no duty to Mrs. Weeks to correctly advise her of Perry's rights to continue his benefits. Accordingly, there are no grounds upon which Advance may be held liable for Yates' alleged statements regarding the plan.[8]

[8]Defendants also argue that ERISA does not permit Mrs. Weeks to sue for individual relief and that because Perry received health insurance under his father's plan as well as charitable services from St. Jude's Hospital, Mrs. Weeks was not harmed. The court does not reach these

IV.

For the reasons stated above, the court grants summary judgment for the defendants.

ENTER this 25th day of June, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE

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questions as the estate demonstrated no ground for liability.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CONNIE WEEKS,	)	
Administratrix of the Estate	)	
of Perry Weeks, Deceased,	)	**Civil Action No. 7:02cv00724**
	)	
Plaintiff,	)	
	)	**Final Order**
v.	)	
	)	
WESTERN AUTO SUPPLY CO., et al.,	)	**By: Samuel G. Wilson**
	)	**Chief United States District Judge**
Defendants.	)	

In accordance with the court's memorandum opinion entered this day, it is **ORDERED** and **ADJUDGED** that the defendants' motion for summary judgment is **GRANTED**. It is further **ORDERED** that this action be stricken from the docket of this court.

ENTER this 25th day of June, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE